No. 02-1711

Supreme Court, U.S.
FILED
JUL 18 2003
OFFICE OF THE CLERK

# In the Supreme Court of the United States

CINCINNATI SMSA LIMITED PARTNERSHIP,

PETITIONER,

V.

PUBLIC UTILITIES COMMISSION OF OHIO,

RESPONDENT.

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## BRIEF IN OPPOSITION

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## SUMMARY OF ARGUMENT

In 1993, Westside Cellular, Inc. d/b/a Cellnet ("Cellnet') instituted an action under then-existing Ohio law alleging that Petitioner (a cellular telephone service provider) had discriminated against Cellnet in the sale or proposed sale of cellular service to Cellnet. In December 2002, the Ohio Supreme Court ruled that 47 U.S.C. § 332(c)(3)(A) ("§ 332"), which prohibits states from regulating the "rates charged" by cellular companies, did not preempt Cellnet's action. The Ohio Supreme Court determined that the express language of § 332 which permits states to regulate "other terms and conditions of service" supported its ruling.

Following that decision, in April 2003, Cellnet and Petitioner settled their dispute. Despite that full and final settlement, Petitioner now seeks a writ of *certiorari* for this Court to review the Ohio Supreme Court's decision.

Petitioner's application for a writ of *certiorari* should be denied for the simple reason that the underlying case has been settled and dismissed, and thus, no case or controversy exists. In essence, Petitioners are asking this Court to review an opinion of the Ohio Supreme Court in a case which no longer exists. Moreover, the law which the Ohio Supreme Court has applied and construed was repealed in 1999. There is nothing left for this Court to review.

In addition to the complete absence of any existing claim or controversy, this case does not present the Court with any conflict between state and federal law. Petitioners argue that § 332 preempted Ohio from considering the underlying dispute. That case, however, was brought by Cellnet alleging that Petitioner had engaged in unlawful discrimination in violation of then-existing Ohio law. Cellnet never claimed that a rate was reasonable or unreasonable, only that Petitioner's conduct was unlawfully discriminatory. The Ohio Supreme Court recognized that, while rate regulation is preempted, § 332 expressly permits states to regulate "other terms and conditions" of service. There is no conflict with any federal forum. The FCC, looking at Ohio's

regulation in the context of the Cellnet case, has held that the Ohio law underlying Cellnet's case did not amount to rate regulation. Likewise, no federal appeals court other than the Sixth Circuit has ever addressed whether Ohio's regulations and statues or similar regulations or statutes from other states are preempted by § 332.

The Sixth Circuit reviewed the Cellnet case in 1997 and held that Cellnet's claim was not facially preempted and that federal courts should abstain from deciding the preemption issue and that Ohio should decide this issue for itself. *GTE Mobilnet v. Johnson*, 111 F.3d 469 (6th Cir. 1997). Ohio's conduct is entirely consistent with that edict, not conflict.

This case is simply an attempt by Petitioner to obtain an advisory opinion to prevent future litigation without affording those "ghost" plaintiffs an opportunity to be heard.

Accordingly, Petitioner's application for a writ of *certiorari* should be denied.

## LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Cincinnati SMSA Limited Partnership ("CLP") has one general partner, Ameritech Mobile Communications LLC, which is not publicly traded and which is an affiliate of Cingular Wireless LLC, which also is not publicly traded. The limited partners of CLP are (i) Convergys Information Management Group, which is owned by Convergys Corporation, a publicly traded company; (ii) ALLTELL Communications Investment Company, which is owned by ALLTELL, a publicly traded company; and (iii) GIT-Cell, Inc., which is not publicly traded.

Respondent is the Public Utilities Commission of Ohio.

Westside Cellular, Inc. d/b/a Cellnet, a party to the proceedings below is not a publicly traded company.

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## BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

On May 2, 2003, Petitioner and Intervenor-Respondent Cellnet fully settled all claims between them. The Ohio regulations in question were repealed effective December 31, 1999. This Court should not issue an advisory opinion on a moot case arising from a law that has been repealed. In any event, the opinion below was correct on the merits and does not conflict with any state or federal precedent. Certiorari should be denied.

## I. PARTIES.

Westside Cellular, Inc. ("Cellnet") was a reseller of cellular telephone minutes and service. Between July 1991 and June 10, 2003, Cellnet purchased bulk cellular service from cellular licensees such as Petitioner on a wholesale basis, and resold that service to consumers. Cellnet is unaffiliated with Petitioner and is, thus, commonly referred to as an "unaffiliated reseller." Petitioner's own retail operations are referred to as "affiliated resellers." Petitioner is a limited partnership owned indirectly by SBC Communications, Bell South and Convergys.

## II. PETITIONER CONFOUNDS "UNREASONABLE RATES" AND "UNREASONABLE DISCRIMINATION."

### A. Petitioner Ignores Well-Settled Distinction Between "Unreasonable Rates" and "Unreasonable Discrimination."

The Telecommunications Act was modeled on the Interstate Commerce Act of 1887 and is interpreted in accordance with it.[1] *MCI Tel. Corp. v. FCC*, 59 F.3d 1407, 1418 (D.C. Cir. 1995). The

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[1] Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. §§ 10101-11917 (1988 & Supp. 1993)).

Interstate Commerce Act was itself based upon "the 'ancient law' of common carriers. . . . Central to the body of common law was the principle that no common carrier has the right to discriminate between persons or places, or to give preferences in any manner." Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions — A Product of Evolutionary Development, in A Legislative History of Communications Act of 1934*, at 25, 29 (Max D. Paglin ed., 1989).[2]

The legislative history of the Interstate Commerce Act shows that Congress has long understood the difference between "unreasonable rates" and "unreasonable discrimination." In 1886, in preparation for passage of the Interstate Commerce Act, Congress authored the Cullom Report. The "Cullom Report noted that discrimination 'is most conspicuous when and where competition is most active.' The committee accordingly concluded that 'whereas competition is a safeguard against extortion' (i.e. the excessive rates that a monopoly can exact), 'experience has shown it is no safeguard against discrimination.' Thus, it was vigorous competition, as much as anything else that gave rise to the wide variety of kickbacks, gratuities, and other devices that agitated much of the public. By 1887, the populist movement that had arisen in opposition to these 'preferences', which were associated with large, monied, better-situated, and particularly corporate interests could no longer be resisted, and the first major federal regulatory statute [the Interstate Commerce Act] was enacted. This history is central to understanding the original paradigm of regulated industries law." Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Columbia L. Rev., 1323, 1333 (October 1998).

The Cullom Report recognized the difference between unreasonable prices (*i.e.*, extortionate rates) and unreasonable discrimination (*i.e.*, even though the prices may be low, the carrier prefers some customers over others). Through the Interstate Commerce Act, and later, the Telecommunications Act, Congress

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[2] *See also Munn v. Illinois*, 94 U.S. 113, 129 (1877) (reviewing common law roots of regulation of common carriers).

separately prohibited unreasonable rates and unreasonable discrimination.[3]

### B. Petitioner's Sleight of Hand: Switching "Unreasonable Discrimination" and "Unreasonable Rates."

The regulation of unreasonable rates and the regulation of unreasonable discrimination are different in substance and in structure. Unreasonable rates are determined by looking at the costs and profits of a service provider. *MCI Tel. Corp.*, 59 F.3d at 1410. In contrast, unreasonable discrimination is determined by looking at whether two buyers are treated similarly – without regard to the costs and profits of the service provider. *MCI Tel. Corp. v. FCC*, 842 F.2d 1296, 1303 (D.C. Cir. 1988).

Both federal and state law regulate unreasonable rates and unreasonable discrimination in separately codified sections. For example, 47 U.S.C. § 201 prohibits unreasonable rates, while 47 U.S.C. § 202 prohibits unreasonable discrimination. Similarly, Ohio Revised Code § 4909 *et seq.* requires reasonable rates while Ohio Revised Code § 4905.35 prohibits discrimination. The inquiry into reasonableness of rates depends on the costs associated with producing a service. *MCI Tel. Corp.*, 59 F.3d at 1407 (exceeding F.C.C. rate of return prescription is *per se* violation of § 201's prohibiting against unreasonable rates). Similarly, *inter alia*, because of concern that utilities might set excessively high rates, Ohio utilities are not generally permitted

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[3] The Supreme Court has similarly recognized that assuring equal rates - as distinguished from low rates - was the primary purpose for barring discrimination. "It cannot be challenged that the great purpose of the act to regulate commerce, whilst [also] seeking to prevent unjust and unreasonable rates, was ***to secure equality of rates as to all and to destroy favoritism***, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination." *New York, N.H. & H.R. Co. v. ICC*, 200 U.S. 361, 391 (1906) (emphasis added); *see also 1* A.G.J. Priest, *Principles of Public Utility Regulation*, 285 (1969) ***("Even exorbitant rates probably have generated less irritation and exasperation than discriminatory practices.")*** (Emphasis added.)

unilaterally to set, prescribe or fix their own rates. Instead, Ohio has an elaborate process under Ohio Revised Code § 4909 for determining, based upon the relevant costs, the "fair" or "reasonable" price that may be charged by a utility. For example, in a case involving the Ohio Bell Telephone Company, the Ohio Supreme Court determined that to regulate the rates in question the Public Utilities Commission of Ohio ("PUCO") must undertake an elaborate six-step inquiry to determine a reasonable rate of return, appropriate costs to be included, project likely revenues, before it may set, prescribe or fix a rate. *City of Cleveland, et al. v. Public Utilities Commission of Ohio*, 164 Ohio St. 442, 443-444 (1956).

For example, both the PUCO and the FCC have frequently determined that a "fair" or reasonable rate provides a profit of approximately ten to twelve percent. *See, e.g., In Re Cincinnati Bell Telephone Co.*, PUCO Case No. 96-899-TP-ALT, 1999 WL 1295929 (Nov. 4, 1999) (requiring and prescribing prices to return reasonable profit of 9.56%); *MCI Tel. Corp.*, 59 F.3d at 1410 (setting maximum rate of return at 12% for overall earnings and each component).

### C. Ohio Abolished Cellular Rate Regulation in 1985.

In the 1970s and early 1980s, the providers of cellular service were required to submit their rates to the PUCO for the its approval. In 1985, the PUCO eliminated any requirement that cellular providers could only charge "reasonable" rates or earn only a "fair" profit. *In the Matter of the Commission Investigation Into the Regulatory Framework for Telecommunications Services in Ohio*, PUCO Case No. 84-944-TP-COI, *Opinion and Order* (April 9, 1985) (the "944 Order"). That order gave cellular providers unlimited discretion to set their own rates, to charge rates in excess of a "reasonable" rate, to charge whatever rates the market would bear, and to earn profits in excess of a "fair" return. The PUCO required only that these companies permit competition in the marketplace from independent or "unaffiliated" retailers

who could purchase wholesale cellular service from the Petitioner's wholesale operations.

The 944 Order first set forth Ohio's requirement that cellular licensees, including Petitioner, maintain separate operations with respect to the wholesale and retail sides of their respective businesses. In the 944 Order, the PUCO stated:

> cellular resellers which are affiliated with the underlying carrier do not . . . fall within the statutory definition of a telephone company, provided the affiliated resellers' operations (which consist of marketing of cellular service as opposed to the actual provision of cellular service) are maintained under a separate set of accounting records from the operations of the underlying carrier, and further provided the affiliated reseller has no involvement whatsoever in the wholesale operations of the underlying carrier (other than as a customer on equal terms as any non-affiliated cellular reseller).

On October 22, 1993, the PUCO issued its *Finding and Order* in the case captioned *In the Matter of the Commission Investigation Into Implementation of Sections 4927.01 through 4927.05 Revised Code, as They Relate to Competitive Telecommunications Services,* PUCO Case No. 89-563-TP-COI ("563 Case"). In its *Finding and Order* in the 563 Case, the PUCO maintained its requirements first promulgated in the 944 Case.

Under Ohio law, the "reasonableness" of the rates or the "fairness" of the return became entirely irrelevant. Petitioner has a right to charge "unreasonable" or "extortionate" rates and has never been subject to an inquiry of its rate of return, costs or profit margin. However, once the Petitioner exercised its unfettered discretion to set rates, these rates must be made available to all takers. Resellers could not be excluded from these rates. Thus, while Ohio law has not regulated cellular ***rates*** since 1985 (*i.e.* "unreasonable rates" are irrelevant), it continued to regulate anti-competitive ***conduct*** and continued to prohibit "unreasonable ***discrimination***." This

distinction between unreasonable rates and unreasonable discrimination has been recognized since 1887 in the Cullom Report, the Interstate Commerce Act, the Telecommunications Act and Ohio law.

## III. PETITIONER SOUGHT AND ACCEPTED THE BENEFITS OF THE OHIO RULES.

Not only was Petitioner permitted to enter the Ohio market, it was the very first company to do so. On May 7, 1985, Petitioner's Vice President and Chief Financial Officer, Dennis Hackl, submitted a sworn affidavit to the PUCO (a prerequisite to obtain operating authority in Ohio)[4] in which he acknowledged Petitioner's obligations under the 944 Order and agreed to abide by them. In this regard, Hackl swore that:

> Retail Cellular Service is offered by a separate, unincorporated, division. . . which purchases the service from [Petitioner] pursuant to tariff and on the same terms and conditions available to competing resellers and resells the service to end users. The Retail Division is not involved in the transmission of messages either through operation or managerial direction.

*In the Matter of the Application of Cincinnati SMSA Limited Partnership for a Certificate of Public Convenience and Necessity to Provide Domestic Public Radio Telecommunications Service in the Greater Columbus Metropolitan Area*, PUCO Case No. 84-1224-RC-ACE, Hackl Affidavit at ¶6.[5] In addition, while Cellnet proved that Petitioner's wholesale operation did not account for any revenue from sales to Petitioner's retail operation, Petitioner swore to the PUCO that it would follow this basic tenet of the 944 Order when Hackl stated

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[4] In Ohio, in 1985, Petitioner was required to obtain a Certificate of Public Convenience and Necessity before it could offer service in the state.

[5] Petitioner filed the same Affidavit in support of its certification in Cincinnati and Dayton. PUCO Case Nos. 83-1308-RC-ACE and 84-1225-RC-ACE.

> Each Wholesale Carrier [i.e. Cincinnati, Columbus and Dayton] separately records its revenues, based on its terms and conditions, from invoices sent to its customers (including the Retail Division).

*Id.* at ¶8(E). Likewise, Hackl swore that

> The direct costs of the Retail Division include charges from [Petitioner's Wholesale operations] for the purchase of wholesale cellular service as well as commissions payable to CPE Sales Co. [another Petitioner affiliate] and other authorized cellular service sales agents.

*Id.* at ¶8(G)(1). Thus, it is clear that Petitioner knew precisely how to comply with the 944 Order; its own affidavit virtually matched the requirements of that Order.

In granting the Certificate, the PUCO stated:

> In that the retail division of the applicant's business keeps separate accounting records, and operates independently from the wholesale operations of the applicant on the same terms as any non-affiliated reseller of the applicant's cellular services, such retail division is not subject to Commission jurisdiction.

*Id.*, *Entry* (May 21, 1985). Based upon these representations, Petitioner's retail operations were deregulated, freed from any rate cases, detariffed, and exempted from utility taxes on over $800 million of retail revenue.

On October 22, 1993, the PUCO reaffirmed the policies set in the 944 Order when it issued the 563 Order.

## IV. UNDER 47 U.S.C. § 332 ("§ 332"), CONGRESS REAFFIRMED THAT STATES CAN REGULATE "OTHER TERMS AND CONDITIONS."

In the early 1990s, some states other than Ohio, including notably California, were regulating the rates charged by cellular carriers. These states, unlike Ohio, required that reasonable retail rates be approved in advance by state public utility commissions. In contrast, since 1985, Ohio had permitted cellular carriers to charge any rate – reasonable or unreasonable – they wished.

In 1993, Congress enacted § 332 which states, in pertinent part, that as of August 10, 1994:

> No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service **except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.** (Emphasis added.)

### A. Legislative History of § 332 Shows That Congress Reserved to States the Right to Ensure That Wholesale Capacity Was Made Available to Cellnet.

The legislative history of § 332 expands on the express limitation on preemption contained in the statute by showing that Congress did not intend to preempt all state regulation of cellular services. In this regard, Congress stated:

> [I]t is the intent of the Committee that the states still would be able to regulate the terms and conditions of these [cellular telephone services]. By 'terms and conditions' the Committee intends to include such matters as customer billing information, and practices and billing disputes and other consumer protection

> matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment, and **the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority.** This list is intended to be illustrative only and is not meant to preclude other matters generally understood to fall under 'terms and conditions.' (Emphasis added.)

H.R. Rep. No. 103-111 at 261 (1993). Moreover, the Senate adopted the same perspective of §332 stating that:

> Section 332(c)(3)(A) of the Senate Amendment is identical to the House provision except that it explicitly recognizes that **nothing in this subparagraph exempts providers of commercial mobile services . . . from requirements imposed by a state commission on all providers of telecommunications services necessary to ensure the continuing availability of telephone exchange services at affordable rates.** (Emphasis added.)

H.R. Conf. Rep. No. 103-213 at 492-93 (1993). The Senate Amendment was later adopted in the Conference Agreement. *Id.* Cellnet is a wholesaler who was being denied the availability of "services at affordable rates." Ohio's right to protect Cellnet's rights is specifically set forth in the legislative history.

Cellnet is a purchaser of wholesale service. Cellnet proved at trial before the PUCO that Petitioner denied Cellnet wholesale capacity by charging Cellnet full price while giving free service to Petitioner's own affiliated reseller. It was obvious to the PUCO and the Ohio Supreme Court that Petitioner cannot do indirectly that which it cannot do directly.

### B. FCC Concludes That Ohio Was "Not Regulating Rates Charged."

Section 332 also included a "grandfathering" clause which permitted states to regulate "rates charged" and/or "market entry" if the state could prove to the FCC that it had "any regulation concerning the rates for any commercial mobile radio service in effect as of June 1, 1993." *Id.*

Even though it was not then regulating rates, Ohio wanted to protect both its current regulations prohibiting discriminatory conduct and its future right to regulate rates. Ohio submitted a petition specifically informing the FCC that pursuant to the statutes and the 944 and 563 Orders cited above, Ohio was "using its complaint authority to ensure that the rates of a cellular wholesaler are not unduly discriminatory, preferential to affiliates, or anticompetitively set below cost." *In the Matter of the Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 F.C.C.R. 7842 (F.C.C. May 19, 1995) ("Ohio Order"). Ohio wished to be able, if necessary, to regulate rates in the future. The FCC denied Ohio's petition on the primary grounds that it did not qualify for the grandfathering clause because Ohio's complaint authority and policies against discrimination did not amount to the regulation of "'rates charged' by any CMRS provider in that state as of June 1, 1993." *Id.* at ¶ 31.[6]

## V. THE CELLNET COMPLAINT.

On October 18, 1993, Cellnet filed PUCO Complaint No. 93-1758-RC-CSS (the "Cellnet Complaint" or the "Cellnet Case") against, *inter alia*, Petitioner. *Westside Cellular, Inc. d/b/a Cellnet v. GTE Mobilnet of Ohio, et al.*, PUCO Case No. 93-1758-RC-

[6] Both Petitioner and the PUCO were parties to this case which the FCC determined was an adjudication on the merits. Ohio Order at ¶ 31 (deciding "Case on the Merits") and fn. 114 (noting that "this is an adjudicatory type proceeding, not a rulemaking").

CSS.[7] The Cellnet Complaint, as amended, alleged six separate counts against Petitioner. Cellnet alleged that Petitioner: failed to maintain separate retail operations or accounting (Count I); established rates that it provided to its own retail affiliate but which it denied to Cellnet (Count II); unlawfully cross-subsidized its retail affiliate (Count IV); violated Ohio Revised Code § 4905.33 and Ohio Revised Code § 4905.35 (Count V); denied Cellnet wholesale service (Count IX); and damaged Cellnet as a result of the unlawful conduct (Count X). Through all of these Counts, the crux of the Cellnet Case was that Petitioner engaged in anti-competitive conduct and unlawfully discriminated against Cellnet.[8]

## VI. PETITIONER'S PREEMPTION ARGUMENT HAS PREVIOUSLY FAILED.

Petitioner moved to dismiss Cellnet's Complaint on several grounds including that Ohio law was preempted by § 332. On March 23, 1995, the PUCO rejected Petitioner's claims and held that Cellnet's discrimination claims fall within the "other terms and conditions" that are expressly reserved to the states by § 332. *Entry*, March 23, 1995 at ¶ 5. Moreover, the PUCO held that even if the FCC determined that the PUCO's complaint authority was preempted, the PUCO would still retain jurisdiction over violations and damages caused before any preemption became effective in 1995. *Id.* State authority would be preempted, if at all, only after the FCC finally adjudicated Ohio's Petition to retain its right to directly regulate retail rates which was August 3, 1995. On reconsideration, the PUCO observed that "[i]t is important to note that [§ 332] purports to affect state rate and market entry provisions [,] not allegations concerning unjust, unreasonable and discriminatory conduct. The allegations raised by Cellnet clearly affect the terms and conditions of service provided by the respondents - issues specifically reserved to state authorities by [§

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[7] With the dismissal without prejudice of GTE Mobilnet in 1999, the caption of the case has changed to *Westside Cellular, Inc. d/b/a Cellnet v. New Par, et al.*

[8] For a detailed description of Cellnet's claims, *see GTE Mobilnet v. Johnson*, 111 F.3d 469, 472-473 (6th Cir. 1997).

332]." PUCO Case No. 93-1 758-RC-CSS, *Entry on Rehearing*, April 13, 1995 at 6, n. 4.

Petitioner's Co-Respondents, New Par n/k/a Verizon and GTE Mobilnet n/k/a Verizon (collectively, Co-Respondents) then sought an injunction from the United States District Court for the Southern District of Ohio to prevent the PUCO from hearing Cellnet' s claims. Curiously, Petitioner failed to join its Co-Respondents in the Southern District action. The District Court ruled that Cellnet's bundling claims against Co-Respondents were not preempted, but otherwise found in favor of Co-Respondents. *GTE Mobilnet*, 111 F.3d at 480 fn. 14.

### A. The Sixth Circuit Rejected Petitioner's Broad Preemption Claim.

Cellnet's case reached the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") which, in denying the claims of § 332 preemption, correctly recognized that "Cellnet's complaint alleges several violations of Ohio law and Commission orders, that together are intended to ensure that services provided by cellular earners operate in a fair and nondiscriminatory manner." *GTE Mobilnet*, 111 F.3d at 477. The Sixth Circuit reversed and remanded the District Court's ruling, and thus established the right of the PUCO to adjudicate the merits of Cellnet's claims. *Id.* The only holding that was not reversed was the District Court's finding that Cellnet's claims for denial of service and bundling were not preempted.

The Sixth Circuit explained the essence of Cellnet's Complaint and the scope of Ohio law: "Under Ohio law, it makes no difference if the rate charged is two cents a minute or twenty dollars a minute, as long as affiliated resellers are charged at the same rates as unaffiliated resellers." *Id.* The Sixth Circuit based its decision to abstain on its express finding that §332 did not exhibit Congress' clear intent to preempt Cellnet's case. *Id.* at 480.

### B. The PUCO Again Rejects Preemption Under § 332.

Following the Sixth Circuit's Opinion, Petitioner again moved the PUCO for dismissal of Cellnet's Case based primarily on preemption. The PUCO once again rejected Petitioner's preemption claims and held that Cellnet's claims pertaining to Petitioner were not preempted since they fell within the state's power to regulate "other terms and conditions."

In January and February 1999, the PUCO conducted a three-week evidentiary hearing on the Cellnet Complaint. The PUCO heard testimony from employees of Petitioner and Cellnet, as well as from expert witnesses.

On January 18, 2001, after nearly two years of careful consideration, the PUCO issued its Opinion and Order in which it found in favor of Cellnet as to seven of the eight counts and four of the six counts pertaining to Petitioner. The PUCO ruled in favor of Cellnet as to Counts I, II, III, IV,[9] V, VI and IX. The PUCO ruled that Petitioner had discriminated against Cellnet and violated PUCO regulations and Ohio statutes. *Id.*

Although Petitioner swore to comply with the Orders, and has continued to take advantage of the resulting deregulation, Petitioner once again claimed that these laws are invalid because they are preempted.

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[9] The PUCO did not find in favor of Cellnet as to any claims made in Count IV against Ameritech.

## REASONS FOR DENYING THE WRIT

### I. THERE IS NO CASE OR CONTROVERSY BECAUSE THE UNDERLYING CASE HAS BEEN SETTLED AND DISMISSED WITH PREJUDICE, AND WAS BASED UPON OHIO LAW THAT WAS REPEALED IN 1999.

#### A. Article III Limits Appellate Jurisdiction to "Actual Ongoing Cases or Controversies."

Under Article III, this Court's "lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco*, 375 U.S. 301, 306 n.3 (1964); *see, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (The Court "may adjudicate only actual ongoing cases or controversies"); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *DeFunis v. Odegaard*, 416 U.S. 312, 316-320 (1974) (*per curiam*). *Federal Election Commission v. Akins*, 424 U.S. 11, 12 (1998). Article III's limitation of judicial power to cases and controversy "'means that [Petitioner]must show, among other things, an injury-in-fact, a requirement that helps assure that courts will not pass upon . . . abstract, intellectual problems,' but adjudicate 'concrete, living contests between adversaries.'" *Id.* at 20.

#### B. There Is No "Actual Ongoing Case or Controversy" Because All Disputes Have Been Settled and Dismissed with Prejudice.

Pursuant to Article III, settlement of a claim before appeal moots the claim and deprives the federal judiciary of jurisdiction over the claim. *U.S. ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. 2002); *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001) (holding that settlement of a dispute renders moot any appeal growing out of that dispute); *Kimberly-Clark Corp. v. Procter & Gamble Distributing Co., Inc.*, 973 F.2d 911 (Fed. Cir. 1992),

(holding that settlement of a dispute renders appeals moot); *In re United States*, 927 F.2d 626 (D.C. Cir. 1991) (case rendered moot and non-justiciable where parties settled suit by agreement reached after Petition for Writ of Certiorari had been filed in Supreme Court); and *Affholder, Inc. v. Preston Carroll Co., Inc.*, 866 F.2d 881 (6th Cir. 1989) (settlement of claim before final adjudication moots claim and deprives federal judiciary of jurisdiction). Similarly, in *Honig v. Doe*, 484 U.S. 304 (1988), the Court held that "under Article III of the Constitution, this Court may only adjudicate actual, ongoing controversies . . . that the dispute ***between the parties was very much alive*** when the suit was filed . . . cannot substitute for the actual case or controversy that an ***exercise of this Court's jurisdiction requires***." (Emphasis added).

Here, Petitioner and Cellnet have fully and finally settled all claims between them. By Order April 2, 2003, Ohio Judge Timothy J. McGinty recognized the settlement and dismissed with prejudice all claims between the parties. *See, also* Petitioner's Brief at 15 (conceding that the case has been settled). Indeed, just weeks after signing a Confidentiality Agreement, Petitioner's minority partner Convergys issued a press release announcing that a settlement had been reached for $22 million. Thus, there is no "actual ongoing case or controversy to adjudicate." Under well-settled law, the United States Supreme Court does not entertain settled cases. Indeed, there is no Article III jurisdiction over such moot cases. Therefore, the Petition should be denied because there is no case or controversy.

### C. There Is No Case or Controversy Because the Ohio Rules Were Repealed Effective December 31, 1999.

Moreover, this Court has consistently refused to interpret state statutes which have been repealed on the grounds that it does not issue advisory opinions. *Roth v. Delano*, 338 U.S. 226 (1949) (declining to render an advisory opinion where Michigan state statute had been repealed); *Naylor v. Superior Court of State of Arizona in and for Maricopa County*, 558 F.2d 1363 (9th Cir.

1977) (holding that issuing an opinion on repealed statute would constitute a prohibited advisory opinion).

Here, the Ohio Rules in question have been repealed. *In the Matter of the Commission Investigation into Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC Lexis 745 (Dec. 16, 1999) (repealing the underlying Ohio Rules as of December 31, 1999, but permitting Cellnet's case for past damages to go forward); *see, also* Petitioner's Brief at 9, fn. 3 (conceding that the Ohio Rules have been repealed). Because the Ohio Rules have been repealed, Petitioner's writ is little more than a request that this Court issue an advisory opinion. This Court should not entertain a case in a dispute that has been settled and which arises from a law that has been repealed. Petitioner's Writ for Certiorari should be denied.

### D. Petitioner Has Failed to Make Any Showing Even of a Speculative Chance of Future Controversies.

Because Petitioner cannot show that there is presently any ongoing case or controversy, Petitioner instead speculates that future unnamed plaintiffs may possibly bring claims. Petitioner does not even identify these phantom plaintiffs. Without such specificity, Petitioner cannot show that it is at risk now or in the future.

## II. PETITIONER LACKS STANDING

### A. Petitioner Lacks Standing As to Any Claim Because Petitioner Cannot Accept the Benefits of a Law for 18 Years and Then Complain That the Law Is Invalid.

The Ohio Rules deregulated Petitioner, lowered Petitioner's taxes, and eliminated any requirement for filing tariffs. The Ohio Supreme Court noted that:

> [Petitioner] actively participated in the commission proceedings that resulted in the 563 orders and submitted comments to the commission that urged the commission to adopt the streamlined regulations contained in the order. Additionally, shortly after the 944 order was adopted, [Petitioner's] predecessors-in-interest applied for and received from the commission certificates of convenience and necessity to operate as deregulated cellular telecommunication service providers. In connection with each of their applications, the applicant provided to the commission an affidavit agreeing to comply with the very requirements of the 944 order that [Petitioner] now challenge[s] as being overly vague. Moreover, it is undisputed that [Petitioner has] accepted and enjoyed a number of benefits that flowed from the deregulation of retail cellular service providers pursuant to the 944 and 563 orders.

*New Par v. Pub. Util. Comm.*, Ohio St. 3d ___, 2002 Ohio 7245, ¶15 (2002). By accepting the benefits of these Orders, Petitioner is estopped from challenging their validity. *United States v. San Francisco*, 310 U.S. 16, 29 (1940) (a party is equitably estopped from challenging the validity of a law the benefits of which it has retained.) As the Supreme Court observed in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936), "[t]he Court will not pass upon the constitutionality of a statute at the

instance of one who has availed himself of its benefits." Later, in *Fahey v. Mallonee*, 332 U.S. 245 (1947), the Court reiterated, "[i]t is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'" *Fahey*, 332 at 255 (*citing United States v. San Francisco*, 310 U.S. at 29). The Supreme Court concluded that "[i]t would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped form questioning the validity of its vital conditions." *Id.* at 256. Petitioner lacks standing to suddenly dispute the validity of laws that it eagerly supported for eighteen years.

### B. Petitioner Lacks Standing to Bring a Claim Regarding Market Entry.

#### 1. No Injury in Fact as to Market Entry Because Petitioner Was the First to Enter the Ohio Market.

In order to establish Article III standing, a plaintiff must demonstrate "injury in fact," a harm that is both concrete and actual or imminent, not conjectural or hypothetical causation, a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant, and he must demonstrate redressability, a substantial likelihood that the requested relief will remedy the alleged injury in fact. *Vermont Agency of Nat. Resources v. U.S.*, 529 U.S. 765 (2000). Petitioner cannot possibly claim standing to argue that Ohio's rules regulated market entry because Petitioner was the very first market entrant. From 1985 to the present, Petitioner has been active in the Ohio market.

#### 2. Petitioner Failed to Preserve Any Claim Relating to Market Entry.

In any event, Petitioner was required to raise this issue on re-hearing to the PUCO. Ohio Revised Code § 4905.10 (issues must be raised on rehearing in order to preserve right to appeal decision

of PUCO). Petitioner failed to do so. Having failed to preserve the issue at the PUCO, Petitioner cannot raise it now. *TRW Inc. v. Andrews*, 534 U.S. 19 (2001).

## III. NO CONFLICT EXISTS BETWEEN THE OHIO SUPREME COURT DECISION AND ANY OTHER FEDERAL OR STATE AUTHORITY.

### A. No Direct Conflict Exists.

Petitioner cannot cite a single case – federal, state or administrative – which holds that 47 U.S.C. § 332 prevents states from adjudicating claims of discriminatory conduct. As discussed below, every entity that has addressed this issue has held in Cellnet's favor.

### B. No Conflict with the Sixth Circuit Which Rejected Petitioner's Claim That Congress Intended to Preempt Cellnet's Claims.

As stated *supra*, this matter has already reached the Sixth Circuit, and that court rejected the argument that § 332 evinced a clear intent to preempt Cellnet's case. *GTE Mobilnet*, 111 F.3d 469. In order to even reach its ultimate abstention decision, the Sixth Circuit made specific and necessary findings about the preemptive effect of § 332. The Sixth Circuit focused on the language used in § 332 and stated:

> On its face, the preemptive reach of section 332 is limited. The statute preempts states from regulating market entry and rates charged, **but specifically allows states to regulate 'other terms and conditions' of service.** (Emphasis added.).

*Id.* at 477. The Sixth Circuit then focused on the legislative history quoted above and recognized that:

> The House report provides a list of examples of matters that fall within the phrase 'other terms and conditions,' **but specifies that the list is 'illustrative only and not meant to preclude other matters as fall within a state's lawful authority.'** (Emphasis added.)

*Id.* Given the language of § 332 and the legislative history, the Sixth Circuit was to quick to find that its "inquiry must focus on whether Cellnet's complaint requires the Commission to regulate market entry or rates charged, or whether it falls into the sphere of "other terms and conditions.'" *Id.* The Sixth Circuit foreclosed any argument that there was any "clear and manifest" intent to preempt within § 332 when it stated that:

> We cannot conclusively determine whether the language of section 332 refers to simply setting rates or whether it refers to any type of adjustment to rates, no matter how indirect.

*Id.* at 478. Certainly if the intent "cannot [be] conclusively determine[d]," it cannot be "clear and manifest."

Petitioner argued that it was the FCC's intent to use market forces to prevent unreasonable discrimination and that there is no place for the states to engage in a determination of what constitutes unreasonable discrimination. The Sixth Circuit disagreed. It "reject[ ed] the district court's conclusion that the plain language of [§ 332] reflects Congress' clear intent to preempt the states' authority to control discriminatory rates" and put the matter to rest by stating that:

> [§ 332] . . . **does not seem to suggest that states may no longer adjudicate individual cases of anti-competitive or discriminatory misconduct.** (Emphasis added.)

*Id.* at 480. Accordingly, the Sixth Circuit held that the PUCO was not facially preempted from adjudicating Cellnet's claim. *Id.* at

478. Thus, even though the Sixth Circuit ultimately abstained from reaching the question of the precise scope of preemption under § 332, it based its decision on a necessary finding that there is no clearly manifested congressional intent to preempt Ohio from continuing to exercise its police power to hear Cellnet's claims. *Id.* at 478-480.

### C. No Conflict Exists with Any Other Federal Circuit.

There is no conflict with the decisions of any other federal circuit. As the Sixth Circuit recognized in rejecting Petitioner's preemption argument, the issues presented in the Cellnet Case are virtually identical to those addressed by the Ninth Circuit Court of Appeals in *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298 (9th Cir. 1995); *GTE Mobilnet*, 111 F.3d at 478. In *Total TV*, the Ninth Circuit held that although the Federal Cable Act, 47 U.S.C. 521, *et seq.*, preempted the states from regulating cable television rates, it did not prevent the plaintiff from bringing an action in California state court alleging that a cable franchise was engaging in below-cost pricing with the intent to destroy competition in violation of California statutes prohibiting such conduct. *Total TV*, 69 F.3d at 300.

The similarities between *Total TV* and the instant case are striking. In *Total TV*, the Federal Cable Television Act at issue states, "**no federal agency or state may regulate the rates for the provision of cable service.**" 47 U.S.C. 543(a)(1). In the instant case, § 332 states, in pertinent part, "**no state or local government shall have any authority to regulate. . . the rates charged by commercial mobile service.**" 47 U.S.C. 332(c)(3)(A). Both preemptive provisions are contained in Title 47, the statutory scheme for FCC issues.

*Total TV* and the instant case are identical in every meaningful way. The state statutes and the allegedly preemptive federal statutes are virtually identical. The Sixth Circuit has recognized that Cellnet's Case and *Total TV* are analogous. *GTE*

*Mobilnet*, 111 F.3d at 478. The results should also be the same - there is no preemption of Cellnet's Case.[10] Moreover, there is clearly no conflict that would justify a petition for *certiorari*.

### D. No Conflict Exists with the Federal Communications Commission.

#### 1. FCC Held That the Ohio Rules Did Not Constitute "Any Regulation Concerning Rates."

When Congress enacted § 332, it included a "grandfather" clause that "**if a State had 'any regulation' concerning the rates** for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994." Ohio Order, 10 F.C.C.R. 7842, 1 3 (1995) (emphasis added).

In 1994, the PUCO petitioned the FCC for the authority to continue to regulate Petitioner and other CMRS providers, even though it believed that it was not then regulating "market entry" or "rates charged." *Id.* In its request for rehearing, the PUCO identified the facts and circumstances of the Cellnet Case and specifically informed the FCC that among its regulatory activities, the PUCO:

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[10] *Cable Tel. Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992) is also analogous to this case. Like the defendants in Total TV, the Appellants in Finneran relied upon the express language of 47 U.S.C. 543, the Cable Act, in arguing that state action preempted the entire field of regulation. The Cable Act as it deals with preemption, closely mirrors § 332. In affirming the state's right to impose regulations, the court in *Finneran* reasoned that Congress did not intend "to reach everything that relates to rate regulation." *Id.* at 102. Instead, the court held, Congress only meant to preempt rules that regulate rates for the provision of service to customers.

> **does use its complaint authority** under Sections 4905.26, 4905.33 and 4905.35, Revised Code **to ensure that rates of a cellular wholesaler are not unduly discriminatory, preferential to its affiliates**, or set below cost for the purpose of inhibiting competition. (Emphasis added.)

Ohio Petition, FCC Case No. 94-109. The PUCO specifically placed before the FCC the issue of whether Cellnet's complaint could be adjudicated.

On rehearing, Petitioner's co-defendants, New Par and GTE Mobilnet, specifically demanded that the FCC order the PUCO to stop adjudicating Cellnet's complaint. Ohio Petition, Order on Reconsideration at ¶¶ 17-18. The FCC declined to do so.

Instead, the FCC reiterated its findings that Ohio was not "regulating the rates charged" as required to qualify for the grand fathering clause. The FCC continued on to state that "[w]e view the statutory "other terms and conditions" language [contained in § 332] as sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints concerning such matters. . . ." *Id.* at ¶ 43. The FCC went on to state that 'nothing in [§ 332] indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe that **Ohio retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS** [i.e. cellular] providers in that state." *Id.* at ¶ 44 (emphasis added).

The FCC knew that the PUCO "posessed authority under state law" to adjudicate Cellnet's complaint. According to the FCC, Ohio retained that authority. Most importantly, like the Sixth Circuit and Congress, the FCC has held that the "other terms and conditions" language of § 332 is "sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints concerning such matters." *Id.* at ¶ 43. The Ohio Supreme Court ultimately agreed.

### 2. Petitioner's Changing Story: First, It Requested an FCC Ruling That There Was No Prior Decision. Now, It Claims There Is a Conflict.

In 2003, after having lost at the Ohio Supreme Court and eight years after the FCC refused to stop the Cellnet claim, Petitioner approached the FCC's Wireless Telecom Bureau desperately seeking relief. Petitioner argued that the FCC had ***never*** ruled on whether states were preempted from prohibiting discrimination. At Petitioner's request, the Wireless Telecom Bureau issued a non-binding letter that stated:

> Based on its review of prior [FCC] decisions, the Bureau believes that the [FCC] has to date declined to decide whether state determination of claims that CMRS providers have engaged in rate discrimination would constitute prohibited rate regulation, or would instead constitute permitted regulation of other terms and conditions under Section 332(c)(3)(A). Instead, the effect of the [FCC's] orders on this issue to date has been to leave such questions for potential future consideration on a case-by-case basis.

Letter of Wireless Telecom Bureau, 18 F.C.C.R. 6522 (April 8, 2003). Petitioner cannot now turn around and suddenly claim that the FCC has "repeatedly rejected state request for regulatory authority to address rate discrimination" when Petitioner has previously claimed that the FCC had made no prior decision. Similarly, the FCC's "consideration on a case-by-case basis" means that there can be no great precedential value or conflict with other cases. Because every case is determined *sui generis*, there can be no conflict with any other case.

### E. Federal Courts Agree That State Authority Is Not Generally Preempted by § 332.

District courts have also consistently construed § 332's preemption provisions narrowly and have found that state law is not preempted. In *Westside Cellular, Inc. v. New Par*, Case No. 1:01CV505 (N.D. Ohio 2001), Judge Economus ruled that Cellnet's claims were not completely preempted and remanded Cellnet's case to the Ohio trial court. *See also, Russell v. Sprint Corp.*, 2003 WL 21212134 (D. Kans. May 22, 2003); *See, e.g., TPS Utilicom Servs., Inc. v. AT & T Corp.*, 223 F.Supp.2d 1089, 1096 (C.D. Cal. 2002); *Bell Atlantic Mobile, Inc. v. Zoning Bd. of Butler Township*, 138 F.Supp.2d 668, 676077 (W.D. Pa. 2001) (§ 332 does not support complete preemption); *Bryceland v. AT & T Corp.*, 122 F.Supp.2d 703, 706-10 (N.D. Tex 2000) (§ 332 does not support complete preemption); *Aronson v. Sprint Spectrum, L.P.*, 90 F.Supp.2d 662, 664-69 (W.D. Pa. 2000) (same); *Sanderson, Thompson, Ratledge & Zimny v., AWACS, Inc.*, 958 F.Supp. 947, 952-58 (D. Del. 1997) (same).

### F. No Conflict Exists with This Court's Holding in *Abilene*.

#### 1. On Its Face, *Abilene* Excludes Discrimination Claims.

Petitioner relies heavily on *Texas & Pac. Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) ("*Abilene*") (holding that a claim for ***discrimination*** was not preserved on appeal and that a claim for unreasonable ***rates*** was barred by the Filed Rate Doctrine). In *Abilene*, this Court explicitly excluded the issue of unreasonable discrimination:

> As nothing in these conclusions relates to the averments of discrimination, undue preference, or a greater charge for a shorter than for a longer haul, those suggest, it may be assumed, or considered to have been eliminated in the course of the trial.

*Id.* at 432. Petitioner cites a case that explicitly states that it is irrelevant to issues of discrimination. *Id.* Thus, there cannot possibly be any conflict with this Court's holding in *Abilene* because *Abilene* does address any claims of discrimination.

### 2. Petitioner's Filed Rate Cases Are Irrelevant Because There Are No Filed Rates for Cellular Services.

Moreover, *Abilene* and its progeny are also inapposite because they are based upon the Filed Rate Doctrine. In *Ting v. AT&T*, 319 F.3d 1126, 1139 (9th Cir. 2003), the court noted that cases based upon the Filed Rate Doctrine are not relevant in industries where no tariffs are filed. In *Ting*, the Ninth Circuit held that:

> To establish that § 202(a) contains an independent statement of uniformity, AT&T relies on *Central Office*, 524 U.S. 214, 118 S.Ct. 1956, 141 L.Ed.2d 222, as well as several cases arising under the Interstate Commerce Act, on which the 1935 Act was modeled. *See, e.g, Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). In all of these cases, however, the regulatory scheme at issue included some form of a federal tariff filing requirement, even though the requirement at times was voluntary. By contrast, the current environment is completely detariffed and highly competitive. AT&T's heavy reliance on *Central Office* is similarly misplaced. That case focuses narrowly on the issue of the preemptive scope of the filed-tariff doctrine. 524 U.S. at 216, 118 S.Ct. 1956 ("The issue before us is whether the federal filed-tariff requirements of the Communications Act preempt respondent's state-law claims."). It provides no support for AT&T's argument that after detariffing state contract and consumer protection laws restricting

> AT&T's ability to impose 1140 the terms of its CSA on consumers are preempted.

*Id.* There are no filed rates in Ohio for cellular providers. Thus, Petitioner's list of cases from tariffed industries is irrelevant.

### G. Petitioner Repeatedly Cites Cases That Have Been Reversed or Rejected.

Curiously, Petitioner relies on numerous cases that have no legal weight here. First, as noted above, Petitioner relies primarily on *Abilene* for a proposition that is totally unrelated to ***discrimination***. Then, Petitioner outrageously relies on the District Court's Opinion in *GTE Mobilnet v. Johnson*, No. C2-95-401, unreported (S.D. Ohio 1995) to claim that "recent federal and state judicial and administrative decisions construe the pre-emptive scope of § 332 broadly." Petitioner's Brief at 21. In fact, the Sixth Circuit reversed this finding. The only part of the District Court's Opinion that remains good law is its finding that Cellnet's claims for illegal bundling are ***not*** preempted. *GTE Moblinet*, 111 F.3d at 480 fn. 14.

Petitioner also relies on *Bryceland v. AT & T Corp.*, 122 F.Supp.2d 703,709 (N.D. Tex 2000). Petitioner fails to disclose that, upon remand, the state court held that § 332 did not pre-empt state law claims. *Bryceland v. At & T Corp.*, 2002 WL 31688961 (Ct. App. Tex. Dec. 3, 2002). Indeed, *Bryceland* reaffirms the fact that § 332 preemption applies only "if the fact finder is required to prescribe, set or fix wireless rates." *Id.* at *2. Thus, *Bryceland* agrees with the proposition that rate discrimination cases are not pre-empted because it is the carrier, not the court, that sets the rate.

## IV. PETITIONER FALSELY REPRESENTS THE "NATIONAL" IMPORTANCE OF THIS CASE.

### A. This Case Does Not Involve the Interstate Sale of Cellular Service.

There is no question that Ohio has the authority to regulate utilities, including telephone companies, which operate within Ohio's borders. *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 164 (6th Cir. 1973). Here, Petitioner argues that since "(Petitioner) operates in interstate commerce" the PUCO was preempted from hearing this case.

There is no evidence that Cellnet sought interstate cellular service. Cellnet is an Ohio company doing business in Ohio. Petitioner, while it may have assets in Ohio and Kentucky, was licensed by the PUCO to provide cellular service within the state of Ohio. Ohio service is the service that Cellnet requested. Petitioner has presented no facts which would allow the Court to conclude that the service being sought by Cellnet was interstate in nature. If it were merely the partial location of facilities in another state that allowed a determination of "interstate" preemption, then no doubt Petitioner would be claiming that its partner, Convergys should be exempt from any and all PUCO regulations because it too has facilities in both Ohio and Kentucky. To hold in favor of Petitioner on this issue based solely on the existence of assets in another state would mean that Ohio could not regulate any public utility which has assets in another state. This would eliminate regulation over virtually every large public utility in Ohio.

In order for this Court to find interstate preemption, it would be necessary to examine the factual record to establish that the services which Cellnet sought are interstate in nature. In *Alascom, Inc. v. F.C.C.*, 727 F.2d 1212 (D.C. Cir. 1984), the court held that "the resolution of FCC pre-emption issues is not a purely legal question, but also involves factual questions as to the scope of the FCC's jurisdiction, and the nature and scope of the state regulation involved." Here, however, there is no evidence in the record that

the service being sought by Cellnet was interstate in nature. Without that evidence, Petitioner cannot establish that any of the services at issue are interstate in scope and thus could, even theoretically, be preempted.

### B. Petitioner's "Parade of Horribles" Is Simply Untrue.

In an attempt to inflate the importance of this case and explain why it was "forced to settle," Petitioner repeatedly suggests that it was subject to $1 billion in damages to Cellnet. This is a gross distortion of the truth. Cellnet's claims never reached $1 billion. In fact, the amount Cellnet claimed was never even enough for Petitioner's parents, SBC and Bell South, to consider it sufficiently material to disclose to their own shareholders as required by SEC rules. Petitioner was not willing to tell its public shareholders that this was a material risk to a single company, yet it wants this Court to believe that Cellnet's claim is important to the entire nation. If Cellnet's claim was not material to Petitioner's own shareholders, Cellnet's claim is surely not material to America.

Cellnet also notes that even though Petitioner entered into an agreement on April 2, 2003 to keep the terms of settlement confidential, Petitioner's partner Convergys sent out a press release on April 18, 2003 reporting that Petitioner had settled for $22 million. *See*, www.Convergys.com/news_results.php?newsid=706. Astonishingly, Convergys claimed that "it was unaware of this settlement until so informed by" Petitioner. *Id.* Apparently, Petitioner did not believe that Cellnet's claim was even sufficiently material to inform its own partner of the potential risk. If Cellnet's claim was not important enough to inform Petitioner's own partner or shareholders, it is not important enough for a writ of certiorari.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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